UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, ex rel. W.W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma, Plaintiffs, v. Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Aviagen, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc., Defendants.	05-CV-0329 GKF-SAJ **THE CARGILL DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' "OMNIBUS MOTION" REGARDING ESI DISCOVERY, INTEGRATED BRIEF IN SUPPORT, AND RESPONSE TO OMNIBUS MOTION**

Defendants Cargill, Inc. and Cargill Turkey Production, LLC ("the Cargill Defendants") respectfully move this Court for an order striking Plaintiffs' omnibus "motion" regarding the Defendants' ESI responses to discovery. Plaintiffs' submission is not a "motion" under the Rules, seeks no relief or order, openly defies the Court's meet and confer requirement, and offers no factual support for any of its allegations concerning the Cargill Defendants. The Court should reject Plaintiffs' submission and its transparent attempt to distract the Court from the live issue actually before it: the broad inadequacy of Plaintiffs' own discovery responses.

To the extent the Court is concerned about the status of the Cargill Defendants' responses, the Cargill Defendants have outlined that status below, including full record support.

DISCUSSION

I. THE COURT SHOULD STRIKE PLAINTIFFS' IMPROPER "MOTION"

The Court should strike Plaintiffs' omnibus "motion" as improper for several reasons. Plaintiffs seek to justify their submission by citing this Court's August 20, 2007 Minute Order (Docket No. 1246.) The Cargill Defendants assume that Plaintiffs are relying on the following language by the Court in that Minute Order:

> Any motions addressing deficiencies in electronic discovery responses should be filed at least ten (10) days in advance of hearing with responses to the filed five (5) days thereafter and the parties should be prepared to address those at hearing.

The Cargill Defendants understood this language simply to address the *timing* of ESI motions, permitting the parties and the Court to address such issues more quickly than under the Local Rules' usual motion schedule. The Cargill Defendants submit that no reasonable person could interpret this language to change the definition of a "motion" under the Federal Rules, to excuse Plaintiffs from their obligation to meet and confer concerning discovery issues, or to encourage the unilateral submission of a one-sided, unsupported, and argumentative monologue in the midst of discovery. Unfortunately, this is precisely how Plaintiffs have apparently read the Court's Minute Order.

A. Plaintiffs' Submission Is Not a "Motion."

At the threshold, what Plaintiffs have characterized as an "omnibus motion" is not in fact a motion at all. Under the Federal Rules of Civil Procedure, a "motion" is "[a]n application to the Court for an order." Fed. R. Civ. P. 7(b)1; Wright & Miller, 5 Fed. Prac. & Proc. Civil 3d § 1190.[1] Conversely, absent a request for an order or other relief, the submission is not a motion.

[1] "For example, a 'request' for an admission under rule 36 and a 'demand' for a jury trial under Rule 38(b) are not considered motions simply because they are not applications to the Court for an order." Wright & Miller, 5 Fed. Prac. & Proc. Civil 3d § 1180.

Thus, a submission that merely discusses a subject that might be suitable for relief is not a "motion" if it does not actually seek that relief. *See St. Paul Fire & Marine Ins. Co. v. Continental Cas. Co.*, 687 F.2d 691, 693 & n.1 (10th Cir. 1982) (addressing submission that stated grounds for party's objection but did not "set forth the relief or order sought" and stating that purported "'motion' is not within contemplation of any rule of federal procedure"); *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 227 (W.D. Mo. 1985) ("Where a party merely objects to a Court's order, rather than making application for relief or other order, such an action does not constitute a motion within the meaning of Rule 7(b)(1)." (citing *St. Paul Fire*, 687 F.2d 691)).[2]

Here, Plaintiffs' "motion" seeks no relief of any kind. It does not ask the Court to issue any order, to compel any party to take or refrain from taking any action, or indeed to do anything at all. Indeed, in Plaintiffs' conclusion, where one would ordinarily expect to find a summary of the relief sought, the "motion" merely reiterates its dissatisfaction with the form and completeness of Defendants' ESI responses.

Instead, according to Plaintiffs' own words, Plaintiffs' submission "is intended to apprise the Court of outstanding issues surrounding the Defendants' ESI productions, as requested by the Court." Docket 1271 at 1 n.1 (emphasis added). In fact, of course, the Court has made no request that the parties apprise it of every minor discovery issue, particularly issues that have not even completed the meet-and-confer process. One need only look at the calendar for the Court's

[2] *See also Lloyd v. Hovensca, LLC*, 243 F. Supp.2d 346, 349 (D.V.I) (holding request to take discovery contained within response to opposing parties' motion did not constitute proper motion under Rule 7(b)); *De Lorenzo v. F.D.I.C.*, 268 F. Supp. 378, 381 (S.D.N.Y. 1967) (noting that "Courts have usually interpreted Rule 7(b) of the federal rules of civil procedure strictly, refusing to recognize requests for relief not specified in the moving papers); *Snellman v. Ricoh Co.*, 836 F.2d 528, 532 (Fed. Cir. 1987) (denying new trial on counterclaim where motion for new trial did not specify it sought that relief).

September 27, 2007 hearing to recognize that the Court has plenty of live, ripe discovery disputes to deal with without the need to solicit additional briefings on potential discovery issues that will likely never reach it.

In sum, Plaintiffs' submission is not a "motion;" it can more fairly be characterized as a "grumble." Plaintiffs' submission to the Court in Docket No. 1271 is not a form of document contemplated or approved by Rule 7(b) or any other rule of civil procedure, and the Court should strike it.

B. Plaintiffs have Failed to Comply with the "Meet and Confer" Requirement.

The Court should also strike Plaintiffs' misframed "motion" because Plaintiffs have failed to comply with the requirement that they "meet and confer" with Defendants concerning the issues raised in the submission. The obligation to meet and confer of course applies to motions that seek protective orders or orders compelling discovery. *See* Fed. R. Civ. P. 26(c), 37(a)(2)(B). Under this Court's local rules, however, the obligation to meet and confer goes further, and applies to any motion addressing discovery disputes:

> **Informal conference to settle discovery disputes.**
>
> With respect to *all motions or objections relating to discovery* pursuant to Fed. R. Civ. P. 26 through 37 and 45, this Court shall refuse to hear any such motion or objection unless counsel first advises the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach an accord.

N.D. Okla. LCvR 37.1 (emphasis added).

Here, Plaintiffs openly flout the Local Rule's requirement. As Plaintiffs' own submission admits, "the meet and confer process is *ongoing and not yet complete*." Docket No. 1271 at 1 n.1 (emphasis added). Plaintiffs' defiance of the meet-and-confer requirement is undoubtedly the reason that their "motion" is unable to ask for any relief; Plaintiffs do not yet

know which of their discovery issues with Defendants will be amicably resolved and which (if any) will require attention by the Court. Plaintiffs' premature "motion" has thus brought about the very waste and inefficiency that the meet-and-confer requirement aims to prevent: Plaintiffs have forced before the Court a potentially unnecessary "motion" raising unripe issues that may yet be resolved through negotiation.

Moreover, Plaintiffs are mistaken in representing that "the meet and confer process is ongoing." At least with respect to a number of the Cargill-specific issues mentioned in Plaintiffs' submission, the meet-and-confer process has not yet even *begun*. For example, as discussed in detail below, Plaintiffs' present submission was *the first notice of any kind* to the Cargill Defendants that Plaintiffs continued to have any issue with the Cargill Defendants' production of ESI in TIFF images with fully searchable native-text extractions. *See* Docket No. 1271 at 5, ¶ 7. Indeed, with the sole exception of the issue of native-format production (which the Cargill Defendants believed was resolved), Plaintiffs have never even mentioned to the Cargill Defendants *any* of the Cargill-specific issues addressed in their "motion," much less begun the meet-and-confer process. *See* Exhibit 4, Affidavit of Theresa Hill. On the contrary, the Cargill Defendants have repeatedly advised Plaintiffs of the availability of additional electronic data and offered to work with Plaintiffs to provide additional reports from their databases if desired. (See Exhibits 1 and 2). Until the present "motion," Plaintiffs have not taken advantage of these offers or hinted at any intention to do so.

In sum, Plaintiffs have not met and conferred with the Cargill Defendants concerning the issues raised in their discovery "motion," and the Court should strike the submission on that ground.

C. Plaintiffs' "Motion" Lacks Evidentiary Support.

In addition, Plaintiffs have offered no evidentiary support at all for any of their allegations concerning the Cargill Defendants' discovery responses. Docket 1271 at 4-6. Plaintiffs' submission cites no evidence in the existing record in support of its claims concerning Cargill's responses and offers the Court no new evidence concerning such conduct. Plaintiffs have submitted no attorney affidavits, no letters or emails, and no examples of claimed deficiencies that bear in any way on the Cargill Defendants' responses. The only thing Plaintiffs have in fact submitted to the Court concerning the Cargill Defendants' ESI responses are bare assertions, assertions that are in many respects false or distorted. (See detailed discussion in Section II below.)

This utter lack of factual support also supports striking Plaintiffs' "motion." Plaintiffs' "motion" does not rest on legal argument; indeed, Plaintiffs' entire 10-page submission does not cite a single legal authority. Plaintiffs' submission instead depends entirely on the *facts* that Plaintiffs allege about the various Defendants' ESI responses. Absent the slightest documentation of such facts, however, the submission is merely a waste of the Court's and the parties' time. *Cf.*, *e.g.*, N.D. Okla. LCvR 7.2(j) ("Factual statements or documents appearing only in the brief shall not be deemed part of the record in the case…."). The Cargill Defendants urge the Court to strike the "motion" on this ground.

D. Plaintiffs' "Motion" Is Intended to Distract from Their Own Failure to Comply with Discovery Obligations.

Inasmuch as Plaintiffs' submission seeks no relief and openly acknowledges that the disputes it discusses are not ripe, one might reasonably wonder why Plaintiffs bothered submitting the "motion" at all. The Cargill Defendants respectfully suggest that the obvious motive for Plaintiffs' submission — indeed, the only motive reasonably inferable under the

circumstances — is to distract the Court from the multiple other pending motions presenting ripe disputes over Plaintiffs' own inadequate responses to Defendants' discovery. As those motions make clear, Plaintiffs' discovery responses have failed to meet Plaintiffs' obligations in a number of ways, ranging from repeated delays to deliberate obstruction to outright refusals to respond. Plaintiffs apparently hope that impugning Defendants' discovery responses will somehow persuade the Court to excuse their own shortcomings in discovery, particularly with respect to Plaintiffs' own ESI responses.

The problem with Plaintiffs' tactic, of course, is that the Defendants' ESI and other discovery motions have been through the meet-and-confer process, reached an impasse, and present actual, live, factually supported disputes for the Court's resolution. In contrast, by Plaintiffs' own admission, the inchoate disputes recited in Plaintiffs' submission have not been addressed (or in many cases even raised) in the meet-and-confer process and may well be resolved through the good faith efforts of the parties. Just as importantly, as discussed in Section II below, the record evidence here demonstrates that the Cargill Defendants have responded and are responding fully and properly to Plaintiffs' requests for ESI discovery.

In sum, the Court should not permit Plaintiffs' "grumble" of a submission to distract it from the real disputes raised by Defendants' motions and the real problems with Plaintiffs' own discovery responses.

II. THE CARGILL DEFENDANTS HAVE RESPONDED AND ARE RESPONDING FULLY TO PLAINTIFFS' ESI DISCOVERY.

Should the allegations in Plaintiffs' "motion" raise in the Court's mind any concerns about the Cargill Defendants' ESI discovery responses, the Court should be aware that Plaintiffs' submission seriously mischaracterizes the status of the Cargill Defendants' ESI production.

A. The Cargill Defendants Have Complied with the Court's ESI Deadline and Their Agreements with Plaintiffs.

In attempting to create the impression of "disputes" over the Cargill Defendants' ESI production, Plaintiffs fail to inform the Court of two key facts central to understanding the *status* of the Cargill Defendants' ESI production. First, unlike Plaintiffs, the Cargill Defendants complied with the Court's Order (entered by agreement of the parties) (Docket No. 1150) and on July 1, 2007 produced **ALL** of its ESI that had been outstanding as of the April 28, 2007 hearing. The *only* ESI production that remains pending for the Cargill Defendants is the ESI that responsive to the Court's July 6, 2007 Order and the agreements reached between Plaintiffs' and the Cargill Defendants in subsequent meet-and-confer sessions.

Second, Plaintiffs fail to inform the Court that Plaintiffs *agreed in advance* that the Cargill Defendants would produce all of their ESI in TIFF image format with *fully searchable* native text extractions. As contemplated by Rule 34, the Cargill Defendants discussed with Plaintiffs the acceptable parameters of the Cargill Defendants' ESI production *before* the production took place, and in particular addressed Plaintiffs' concerns about a strict native-format production as early as April 26, 2007. (See Exhibit 1, Letter from Dara Mann to Richard Garren dated April 26, 2007) Through discussions in April, May, and June, 2007, Plaintiffs and the Cargill Defendants ultimately agreed that the Cargill Defendants would make their ESI productions in TIFF image format with *fully searchable* native text extractions. This final agreement is set forth in a June 26, 2007 letter from Dara Mann, counsel for the Cargill Defendants, to Trevor Hammons, counsel for Plaintiffs. (See Exhibit 2, Letter from Dara Mann to Trevor Hammons dated June 26, 2007.) Between the time the Cargill Defendants produced their ESI documents on July 1, 2007 and the time Plaintiffs filed their "motion" on September 17, 2007 (almost three months later), the Cargill Defendants received no communication from Plaintiffs regarding any alleged "deficiencies" in the Cargill Defendants' ESI production, and

Plaintiffs' ESI liaisons have not requested to meet and confer with the Cargill Defendants' ESI liaisons concerning the particular alleged deficiencies described in Plaintiffs' "motion." Hill Aff. ¶ 7.

B. The Cargill Defendants Have Produced Their ESI in a Reasonably Useable Format.

Months after reaching an agreement with the Cargill Defendants, Plaintiffs now belatedly try to generate concerns about the format of the Cargill Defendants' ESI production. Notably, however, Plaintiffs' complaints about the searchability of the ESI production (1) fail to acknowledge the fully searchable native text extraction provided with the Cargill Defendants' TIFF images and (2) fail to identify what problems Plaintiffs have *actually* encountered in running searches with the native text extraction. Instead, Plaintiffs' "issue" seems to be a theoretical discussion of search capabilities that might be lost if a production is not in full native format. Even in this theoretical discussion, however, Plaintiffs offer the Court no compelling reason to excuse them from their prior agreement concerning the production format.

Plaintiffs also do not acknowledge, much less address, any of the significant concerns that a full native-format production would raise. As thoroughly outlined in the Cargill Defendants' letters to Plaintiffs on this subject, these concerns include:

- the inability to bates-number or redact native format productions;
- the inability to permanently identify or remove confidential or privileged information; and
- the ability of anyone receiving the native-format documents to manipulate the Cargill Defendants' data, threatening the integrity and authenticity of that data.

Plaintiffs' only specific complaint about the Cargill Defendants' method of ESI production is with the document bates-numbered CARTP098581-596. Plaintiffs suggest that it

is difficult to use the information as provided and that they have to go through an elaborate printing and taping process to make the documents useful. Now that the issue has been raised with the Cargill Defendants (for the first time), the Cargill Defendants agree that in converting this particular document to TIFF image, the images are not reasonably usable. Accordingly, the Cargill Defendants are already exploring alternatives to reproducing this document (and any other documents presenting similar issues) in a format that will allow it to be reasonably usable. Had Plaintiffs simply alerted the Cargill Defendants to the problem, the issue could have been easily resolved without recourse to the Court.

C. The Cargill Defendants Have Identified All Electronic Systems with Information Relevant to this Litigation.

Plaintiffs' "motion" also expresses concerns that the Cargill Defendants have failed to provide information regarding "all systems containing electronically stored information." Plaintiffs' concerns are unfounded. In an attempt to support their hypothesis, Plaintiffs direct the Court to a document bates-numbered CART103889-905, which Plaintiffs describe as a "schematic of very large databases." Plaintiffs then infer from the schematic that the Cargill Defendants must have "a huge amount of available data that can be searched to provide the information responsive to the State's discovery requests."

The document identified as CART103889-905 is indeed a schematic of a database. It is ***not***, however, a schematic of a database used by the Cargill Defendants' Arkansas turkey production complex, nor is it a schematic of a database containing information regarding the Cargill Defendants' IRW growers. Rather, the schematic is a visual representation of a database used only at the turkey production complex in Virginia.. Hill Aff. ¶¶ 8-10. As it turns out, the

schematic is not all relevant to this action and was produced inadvertently.[3] Again, had Plaintiffs simply asked the Cargill Defendants about the schematic, Plaintiffs' misreading of the document could have been quickly corrected.

D. The Cargill Defendants Have Repeatedly Informed Plaintiffs that Their Databases have the Ability to Report Information in Ways other than That Produced.

Plaintiffs' "motion" further suggests that the Cargill Defendants' have provided only "piecemeal" information from its databases because the Cargill Defendants have not replicated and produced to Plaintiffs the entire contents of all their electronic systems. The Cargill Defendants' production, however, has been anything but piecemeal. The extensive correspondence between Plaintiffs and the Cargill Defendants shows that the Cargill Defendants have repeatedly told the State *exactly* what they were producing from their databases and have repeatedly offered to work with Plaintiffs to obtain any other information Plaintiffs may want, including information gathered through the use of Plaintiffs' proposed search terms. The Cargill Defendants' correspondence to Plaintiffs address this very issue repeatedly:

- *April 26, 2007 Letter:* "With regard to the Cargill defendants' productivity systems (e.g. FICIMS, BILLS, REPETE, TFS, etc.), the Cargill defendants have already produced custom reports generated by them in the normal course of business that are responsive to the State's requests . . . . We acknowledge that these systems may be capable of reporting the responsive information in different formats than previously provided. However, the Cargill defendants do not anticipate making any further production of ESI contained in these systems at this time. Should the State seek additional or different reports from these systems at some point in the future, the Cargill defendants will certainly consider such a specific request when and if made." (See Exhibit 1.)
- *May 16, 2007 Letter:* "Unfortunately, the Cargill Defendants are not in a position to share the list of search terms they developed. This list was developed by the Cargill Defendants' counsel not just to encompass the State's discovery requests in this case, but also to encompass additional needs

[3] The Cargill Defendants have not produced any "schematics" for the databases relevant to this action because no such "schematics" exist. All relevant databases were identified to the State during the ESI disclosure process mandated by the Court.

> the Cargill Defendants may have for information in this or other litigation. Accordingly, the list we have developed is privileged. However, if the State has a list of search terms they would like for the Cargill Defendants to consider, I ask that you provide that list to me within the next week. Upon receipt of the State's proposed list, the Cargill Defendants can advise the State whether its proposed terms are ones that were included in the search already conducted. (See Exhibit 3)

- *June 26, 2007 Letter*: "The Cargill Defendants do not anticipate making any further production of ESI contained in these [productivity] systems at this time. However, should the State desire reports generated from these systems in formats different from that previously provided, we are certainly willing to consider such a specific request when and if made." (See Exhibit 2.)

In fact, the "birds produced in the IRW" report that Plaintiffs reference in paragraph 7 of their "motion" demonstrates that the Cargill Defendants have lived up to their promises to provide whatever additional information from their electronic systems that Plaintiffs may desire. Though Plaintiffs claim that they do not understand why the Cargill Defendants did not previously produce the bird report referenced, the Cargill Defendants have repeatedly informed the Plaintiffs (even in the answer to the Interrogatory that sought this information) that the Cargill Defendants' systems are not designed to track the "annual aggregate bird count" at specific locations on an annual basis and the Cargill Defendants do not use these systems to generate such information in the normal course of their business. Nevertheless, *at the urging of Plaintiffs' counsel*, the Cargill Defendants agreed to provide whatever reports these systems were able to generate along these lines. The reason that the Cargill Defendants cannot represent the accuracy of the data in the reports ultimately generated is *not* because the data was produced in TIFF format, but because the databases were never intended to track this type of information. The databases therefore may not account for all factors that would be relevant to calculating a true annual aggregate bird count for a given location (for example, transfer of birds between farms within a given time period). Having asked for and received the report they sought despite

the Cargill Defendants' stated concerns, Plaintiffs have no basis on which to complain to this Court.

E. Commercial Fertilizer has No Relevance to this Action.

Finally, Plaintiffs suggest that the Cargill Defendants have "intentionally" withheld purportedly responsive ESI regarding a commercial fertilizer company formerly affiliated with Cargill, Inc. This is not in fact an ESI issue at all. As Plaintiffs well know, beginning with the Cargill Defendants' initial response to Plaintiffs' July 10, 2006 document requests, the Cargill Defendants have consistently objected to producing any information—hard copy or electronic—about commercial fertilizer. Again, beyond their flat assertions of relevance, Plaintiffs offer this Court with no facts to suggest why the scope of discovery in this case, which concerns the environmental effects of the land application of poultry litter, should be expanded to encompass commercial fertilizer. Commercial fertilizer is *not* poultry litter, and the environmental effects of commercial fertilizer are *not* the basis of Plaintiffs' claims against the Cargill Defendants.

CONCLUSION

For the reasons discussed above, Defendants Cargill, Inc. and Cargill Turkey Production, LLC urge the Court to strike Plaintiffs' omnibus "motion" as improper. In the alternative, to the extent Plaintiffs include an actual request for relief in any reply or in oral argument, the Cargill Defendants urge the Court to deny that request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 21st day of September, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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